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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 432.

WILLIAM E. LAMB, *Petitioner*,

vs.

STERLING B. CRAMER, ET AL., *Respondents*.

REPLY OF PETITIONER TO RESPONDENTS' STATEMENT OF FACTS, AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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May it Please the Court:

The sole issues presented by the petition are whether the Court of Appeals had jurisdiction to reverse on any ground the judgment of the district court discharging the rule to show cause and dismissing the petition for contempt and whether, if it had jurisdiction to do so on some ground, it could

do so by treating the judgment of the district court as one which merely quashed service of the citation.

Respondents do not attempt to meet these issues at all. They seek unsuccessfully to avoid them by asserting (p. 5) that they are not involved.

They make no attempt to reconcile the judgment of the court of appeals which reversed a judgment of the district court finally discharging a rule to show cause and dismissing a contempt petition with the fact that, in the Court of Appeals, respondents expressly acquiesced in that final judgment.

The reply makes a number of assertions to show that the issues presented in the petition do not arise on the record. These assertions do not establish the point but, in so far as they involve questions of fact, respondents have gravely misrepresented the record as to matters which, it is submitted are not even ambiguous.

They assert:

(1) the citation and petition for contempt instituted only an ordinary ancillary civil proceeding in equity (p. 6. See also p. 3);

(2) petitioner was a defendant for all purposes in case No. 129, which is the case in which the contempt proceeding was instituted (pp. 3, 5, 6, 9, 10);

(3) petitioner sought immunity from service of the citation on the ground that he was a non-resident attorney attending court in a foreign jurisdiction (pp. 4, 8);

(4) the district court discharged the rule to show cause and dismissed the petition solely for that reason (p. 4);

(5) the decree of the district court in No. 129 was

not a consent decree but was a judgment of the court (p. 10);

(6) the judgment of the court of appeals merely required petitioner to stand trial in the district court in an ordinary civil proceeding (p. 5);

(7) the temporary injunction issued by the district court after the contempt proceeding was instituted was issued on the contempt petition (p. 7).

These assertions directly contradict the record.

(1) The petition and citation for contempt did not institute an ordinary civil proceeding. Both the petition and the citation charged this petitioner with contempt of the district court, and the latter required him to show why he should not be punished. (R. 122, 128, 129, 130.) Moreover such a petition and citation could not as a matter of law institute an ordinary civil proceeding. *In re Chiles*, 89 U. S. 157. Counsel for respondents, who are also counsel for the receiver (respondent in No. 433) do not explain how, after the appointment of the receiver, respondents in this case can maintain an ordinary civil suit which is based upon a cause of action arising before the entry of the consent decree, simultaneously with a similar suit by the subsequently appointed receiver.

(2) Petitioner's answer to the contempt charge was not a general appearance in No. 129. The answer was expressly filed on special appearance directed solely to the contempt proceeding. (R. 147.)

(3) Petitioner never claimed immunity from service of the citation on the ground that he was a non-resident attorney attending court in a foreign jurisdiction. Objection 15, to which respondents refer on p. 4, says nothing whatever about petitioner being a "non-resident." No evidence of non-residence was

introduced and immunity was not sought on that ground.

(4) The judgment of the district court shows that it was not rendered because the court was of the opinion that petitioner was immune from service of the citation for any reason. On the contrary the judgment expressly states that it was rendered because "the court * * * is of the opinion that the rule to show cause should be discharged and the petition dismissed." (R. 176.)

(5) The decree in No. 129 was, in terms, a mere consent decree and not a judgment of the court. (R. 131-146.) Respondents urge this court to take cognizance of the record in the companion case, No. 433, for a better understanding of this case. Should the court do so it will find that the record in No. 433 contains an affidavit of one of the counsel for respondents in this case, in which counsel solemnly swears, not only that the decree in No. 129 was a mere consent decree, but that it represented a voluntary compromise and settlement of that case which was submitted to and approved by the district court solely as a consent decree. (Case No. 433, R. 140-145.)

(6) The judgment of the court of appeals did not merely require petitioner to stand trial in a civil case. It reverses the judgment rendered by the District Court which discharged a rule to show cause and dismissed the contempt petition. The opinion of the court of appeals contains categorical expressions to the effect that the petition and citation for contempt stated a case of contempt and it requires petitioner to stand trial in the district court on a contempt charge. (R. 207-209.)

(7) The temporary injunction was not issued on

the contempt petition. The order expressly states that the injunction was issued on the original bill of complaint. (R. 127.)

Whatever may be respondents' motive in misrepresenting the record, the issues presented by the petition in this case are not affected by such misrepresentations but it is respectfully submitted that they furnish an explanation for similar errors contained in the opinion of the court of appeals.

Respondents also make obviously unfounded assertions of law in their effort to substantiate their misrepresentations of fact and to show that the issues presented by the petition do not arise on this record.

They argue (pp. 6-8) that the proceeding in the district court was not a proceeding for criminal contempt because the petition for contempt also contained a prayer for civil relief. That the proceeding was unquestionably a proceeding for criminal contempt and could not under the circumstances be anything else has been shown on page 9 of the petition. The fact that respondents included in a petition for a citation for criminal contempt a prayer for ordinary civil relief does not in the least change the character of the contempt proceeding. This court has held under identical circumstances that such a misjoinder merely renders the attempt to secure ordinary civil relief in the same proceeding void.

In re Chiles, 89 U. S. 157.

Respondents admit (p. 9) that the proceeding in the district court was a "summary" proceeding, but they do not appear to recognize that there is any distinction between a "summary" proceeding, which is not a proceeding for criminal contempt, and an or-

dinary civil case (p. 6). There is a fundamental distinction. The jurisdiction of the district court to proceed for either civil or criminal contempt is limited by Section 385, Title 28, U. S. Code. In neither case have they any jurisdiction unless it clearly appears that conduct falling under one or more of the provisions of Section 385 is involved.

Gompers v. Bucks Stove & Range Co., 221 U. S. 418.
Ex Parte Robinson, 86 U. S. 505.
Michaelson v. United States, 266 U. S. 42.
Ex Parte Hudgings, 249 U. S. 378.
Savin, Petitioner, 131 U. S. 267.

Respondents also assert (pp. 18-20) that no significance can be attributed to the wording of their assignment of errors which urged that the district court erred in quashing service of a citation for contempt considered as ordinary civil process. Respondents' arguments (pp. 3-6, 8-10) clearly show that the assignment of errors is phrased as it is, not through any mere unfortunate choice of words, but because respondents intended to, and subsequently did, acquiesce in the judgment actually rendered by the district court and sought to have it appear that the district court also rendered a judgment which merely quashed service of the citation for contempt considered as process for instituting an ordinary civil proceeding.

Respondents argue that the questions raised by the petition in this case are not of general importance (pp. 14, 18) and that the writ should not issue because the judgment of the court of appeals is interlocutory. (p. 13-18.)

The questions presented by the petition involve the jurisdiction of courts of appeal and the finality of judgments rendered by district courts in criminal cases. Under the decisions of this Court and the court of appeals for the second circuit, any judgment for the defendant in any criminal case, including contempt proceedings, is final and not appealable.

United States v. Sanges, 144 U. S. 310.
United States v. Bittner, 11 F. (2d) 93.
Wingert v. Kieffer et al., 29 F. (2d) 59.

Similarly judgments in civil contempt proceedings can not be reviewed except on appeal from the final decree entered in the case.

Doyle v. London Guarantee Co., 204 U. S. 599.
Matter of Christensen Engineering Co., 194 U. S. 458.
Gompers v. Bucks Stove & Range Co., 221 U. S. 418.
Hultberg v. Anderson, 214 Fed. 349.
Clay v. Waters, 178 Fed. 385.

Thus, regardless of the nature of the contempt proceeding in which the order of the district court was rendered, the assumption of jurisdiction by the court of appeals was in conflict with the decisions of this Court and other courts of appeal.

The fact that the judgment may be interlocutory does not affect the jurisdiction of this Court to issue the writ. The Court can and has repeatedly done so to review interlocutory orders in proper cases.

Section 347, Title 28, U. S. Code.
Morris & Co. v. Skandanavia Insurance Co., 279 U. S. 405.

Forsyth v. Hammond, 166 U. S. 506.
Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117.
U. S. v. Gulf Refining Co., 262 U. S. 738.
Geo. A. Fuller Co. v. Otis Elevator Co., 245 U. S. 489.

The present case is one which requires that the writ issue at this time, not only to remove the conflict between the decision of the circuit court of appeals for the fifth circuit and the decisions of this Court and other courts of appeal, but also in order that the court of appeals for the fifth circuit may not, through an exercise of jurisdiction beyond its statutory powers, deprive petitioner of the finality of the judgment of the district court discharging a rule to show cause and dismissing a petition in a criminal contempt proceeding.

It should also issue because the court of appeals has arbitrarily attributed to the district court a judgment which that court never rendered.

See *Fayerweather v. Ritch*, 195 U. S. 276, 298-299.

It is respectfully submitted that respondents' reply does not show that the court of appeals had jurisdiction in this case, or dissolve the conflict on that point between the decision of the court of appeals for the fifth circuit and this Court and other courts of appeal, or show that the issues raised by the petition are not presented by the record. The writ should therefore issue at this time in order that the jurisdiction of the court of appeals may be confined within the limits prescribed for it by statute, that the conflict resulting from its decision may be removed by this

court, and that the finality of judgments for the defendant in criminal cases may be protected.

Respectfully submitted,

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